In The

Supreme Court of the United States

October Term 1978

No. 78-608

CASSANDRA LUMPKIN,

Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK, THE ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICE, PHILIP L. TOIA, MERLE N. FOGG and JOHN J. FAHEY,

Appellees.

MOTION TO DISMISS APPEAL

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JURISDICTIONAL STATEMENT

Motion to Dismiss Appeal

Appellees, Department of Social Services of the State of New York (hereinafter State Department) and Philip L. Toia, formerly the Commissioner of the Department of Social Services of the State of New York* (hereinafter State Commissioner), move to dismiss the appeal herein on the ground that it is manifest that no substantial Federal question has been raised or is involved.

*Barbara Blum is now Commissioner.

Statute and Regulations Involved*

Section 507 of Public Law 90-575 provides that, for the purpose of any program assisted under Titles I, IV, X, XIV, XVI or XIX of the Social Security Act, no grant or loan to any undergraduate student for educational purposes made or insured under any program administered by the Commissioner of Education (hereinafter referred to as Federal educational grants or loans) shall be considered to be income or resources. This provision has been implemented with respect to the Aid to Families with Dependent Children (AFDC) program (42 U.S.C. § 601, *et seq.*) by Federal Regulation 45 C.F.R. 233.20 (a) (4) (ii) (d), which requires that in determining need and the amount of public assistance grant, any Federal educational grant or loan to any undergraduate student is to be disregarded as income and resources.

Moreover, Federal Regulation 45 C.F.R. 233.20 (a) (3) (iv) (b) requires that a State plan for AFDC must disregard loans and grants such as scholarships obtained and used under conditions that preclude their use for current living costs.

The foregoing Federal Regulations have been implemented in the State of New York in section 352.16 (Exemption of Income and Resources – General Policy) of Title 18 of the New York State Official Compilation of Codes, Rules and Regulations (18 NYCRR).

Under paragraph (1) of subdivision (c) of section 352.16 (18 NYCRR), no part of a scholarship, grant or other such income that is necessary and actually used to cover the cost of necessary and essential school expenses of an applicant for or recipient of public assistance, can be considered as income in determining need and amount of assistance. Necessary and essential school expenses are defined as including: tuition, books, fees, equipment, special clothing needs, transportation to and from school, and child care services necessary for school attendance.

*These are set out, in pertinent part, at pages 3 and 4 of the Jurisdictional Statement.

By virtue of paragraph (2) of the same State Regulation, a Federal educational grant or loan to an undergraduate student cannot be considered as income or resources in determining need and amount of assistance.

The State Commissioner has interpreted his Regulations to require that Federal educational grants and loans must be compared to the necessary and essential school expenses of an applicant for or recipient of public assistance for the purpose of determining whether such person has excess non-Federal, non-exempt educational grants available, after all of his necessary and essential school expenses have been met, to apply against his public assistance needs and thus reduce the amount of his grant (AB1-3).*

Statement of Case

This appeal is from a decision of the Court of Appeals which rejected appellant's contention that in computing the amount by which non-Federal educational grants exceed necessary and essential school expenses, it is improper under controlling statutes and regulations to first reduce such expenses by the amount of United States Basic Educational Opportunity Grants (BEOG) or other Federal educational grants (A-6)**.

Appellant was in receipt of a grant of AFDC on behalf of herself and her minor brother during the spring of 1976, while she attended the Albany Business College. In addition to her AFDC grant, she received funds from the New York State Tuition Assistance Program (TAP) in the amount of $750 and the

*Numbers in parentheses preceded by the letters AB refer to the Appendix attached hereto.

**Numbers in parentheses preceded by the letter A refer to the Appendix attached to Appellant's Jurisdictional Statement.

BEOG program in the amount of $700. Appellant had educational expenses of $925. Consequently, the appellee, Albany County Department of Social Services, determined to reduce appellant's AFDC grant because after first comparing her BEOG grant against her educational expenses and then her TAP award to the balance of those expenses, the appellant had excess TAP award funds which were available to be applied against her public assistance needs (AB-4).

Appellant appealed this determination to the State Department of Social Services. The State Commissioner's fair hearing decision affirmed the determination of the Albany County Department of Social Services and concluded that appellant had $525 Excess TAP award funds, after all of her necessary and essential school expenses had been met, which should be applied against her needs in determining the amount of her AFDC grant (AB-4, 5).

This proceeding was then commenced seeking a judgment, *inter alia*, annulling the Commissioner's fair hearing decision, and urging that appellant be reimbursed for any reduction in assistance caused by applying Federal educational loans and grants for the purpose of determining whether other educational loans, grants or scholarships constitute available income or resources (A. 19-26). A judgment was rendered in Supreme Court, Albany County, annulling the Commissioner's fair hearing decision on the ground that he had failed to follow his own Regulation (18 NYCRR 352.16 [c]) (A. 16-18).

On appeal to the Appellate Division of the State Supreme Court, Third Judicial Department, the judgment was unanimously reversed on the law (59 AD2d 485). The Court rejected appellant's argument that her BEOG funds had been improperly applied against her public assistance needs.

Appellant appealed to the Court of Appeals, which affirmed the order of the Appellate Division (45 NY2d 351).

Reasons for Dismissing Appeal

Appellant contends that this Court should take jurisdiction of this case because the interpretation placed by the State Commissioner on the State Regulations (18 NYCRR 352.16 [b] & [c]), and upheld by the Court of Appeals, is said to be contrary to a fair reading of the controlling Federal Regulations (45 C.F.R. 233.20 [a] [3] [iv] [b] & [a] [4] [ii] [d]), and in any event, is repugnant to the Congressional intent of section 507 of Public Law 90-575 (App., Jur. St., pp. 10, 12).

It is submitted that such contentions do not raise a substantial Federal question. The State Commissioner's Regulations are, on their face, consonant with section 507 of Public Law 90-575 and the Federal Regulations. Furthermore, the State Commissioner's interpretation of his Regulations is not prohibited by section 507 of Public Law 90-575 and the Federal Regulations, and is acceptable to Federal authorities from a legal and programmatic point of view.

I.

The AFDC program is a system of cooperative federalism in which there is an interplay between State option and Federal mandate (cf. *Quern* v. *Mandley*, ____U.S.____, 56 L.Ed. 2d 658 [1978]). The method of analysis used to define Federal standards under the AFDC program " * * * is no different from that used in solving any other problem of statutory construction", and the " * * * words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary" (*Burns* v. *Alcala*, 420 U.S. 575, 580, 581 [1975]).

Section 507 of Public Law 90-575 provides that for the purposes of AFDC, and other Federal programs, Federal educational grants and loans shall not be considered "income or resources". Within the public assistance field, "income" and "resources" are considered in relation to a state's need standard to determine

financial eligibility for public assistance and the amount of the grant (see 45 C.F.R. 233.20 [a [3] [ii]). It is the stated policy of the State Commissioner and the State Department, as expressed in Regulation 18 NYCRR 352.16 (c) (2), not to consider Federal education grants or loans in determining need and amount of assistance. Accordingly, if appellant's BEOG grant had exceeded her necessary and essential school expenses, the State Commissioner would not have considered her excess BEOG grant to determine her eligibility and the amount of her public assistance grant. Section 507 of Public Law 90-575 requires no more than this.

The obvious intent of section 507 is to assure that Federal educational grants and loans will be used for educational purposes. It does not by its terms prohibit a state from comparing a Federal educational grant or loan against a person's educational expenses, and it does not make the grant or loan invisible. The language of section 507, and its legislative history, do not remotely suggest that Congress intended to exempt overlapping non-Federal educational grants and loans from being considered in determining need and amount of assistance.

The appellant in this case received and retained a full BEOG grant plus an additional State TAP award. All of her necessary and essential school expenses were met, and, in addition, all of her public assistance needs and those of her brother, as established under the Social Services Law of the State of New York, were met. It is clear that the State Regulations and the State Commissioner's interpretation thereof, do not in any way impair the operation of section 507, nor does it in any way stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress (cf. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141-143 [1963]).

The interpretation placed by the Commissioner on his Regulations is not repugnant to section 507 of Public Law 90-575.

II.

It is also clear that the implementing State Regulations (18 NYCRR 352.16 [c] [1] & [2]) are patently consistent with the controlling Federal Regulations which require that non-Federal educational grants or loans obtained and used under conditions that preclude their use for current living costs not be included as income (45 C.F.R. § 233.20 [a] [3] [iv] [b]) and that Federal educational grants or loans be disregarded in determining need and amount of assistance (45 C.F.R. § 233.20 [a] [4] [ii] [d]). Under the State Regulations non-Federal educational grants or loans necessary for and actually used to cover necessary and essential school expenses are not considered in determining need and amount of assistance (18 NYCRR 352.16 [c] [1]) and Federal educational grants or loans cannot be considered in determining need and amount of assistance (18 NYCRR 352.16 [c] [2]).

The pivotal question raised by appellant in the Court of Appeals, therefore, was whether the State Commissioner had reasonably interpreted the State Rgulations and whether that interpretation was contrary to the controlling Federal Regulations. The Court of Appeals and the Appellate Division, both held that the State Commissioner had reasonably interpreted the State Regulations and that his interpretation was not inconsistent with controlling Federal Law and Regulations. The Court of Appeals held, absent an explicit restriction in Federal Law and Regulations, which is did not find, that it cannot be irrational "to apply an educational grant to educational expenses, the very purpose for which the grant was awarded" (A-7). This is consistent with this Court's holding *N.Y.S. Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 423 (1973) that since Congress has given the states broad discretion in the AFDC program, the courts may not avoid a state's actions "'[s]o long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act'". There is absolutely no provision in the Federal Regulations that requires the Commissioner to make believe, as

far as the AFDC program is concerned, that Federal educational grants and loans do not exist.

Moreover, a state plan under the AFDC program must provide (42 U.S.C. § 602 [a] [7]) " • • • that the State agency shall, in determining need, take into consideration any • • • income and resources of any • • • relative claiming aid to families with dependent children • • • ".

In *Richman* v. *Juris* (393 F. Supp. 349 [Dist. of Oregon, 1975]), which upheld a practice similar to New York's with respect to treatment of Federal and non-Federal educational grants, the Court held (at p. 351):

> "[t]he state may not violate Regulation 233.20 (a) (3) (iv) (b) by ignoring as income state loans and scholarships which are available to be used in meeting current living expenses".*

The State Commissioner, therefore, was not only acting reasonably and in a manner not prohibited by Federal Law and Regulations, but he was also acting in accordance with a Federal mandate when he compared appellant's Federal educational grant with her educational expenses for the purpose of determining whether she had non-Federal educational funds available to be used in meeting current living expenses.

It is also significant that the Commissioner's interpretation of the State Regulations has not been rejected by the Federal authorities responsible for the administration of the AFDC program. The Court of Appeals in its opinion took not (A-8):

> " • • • that the officials of the federal Department of Health, Education and Welfare advise that the allocation procedures employed by State Commissioner are acceptable to the federal authorities from both a legal and programmatic point of view."*

*45 C.F.R. § 233.20(a) (3) (iv) (b) implements 42 U.S.C. § 602(a) (7).

It is well settled that the construction of a statute by those charged with its administration should be followed unless there are compelling indications that it is wrong (*N.Y.S. Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 421 [1973]; *Dandridge* v. *Williams*, 397 U.S. 471, 481 [1970]). The appellant has not shown any compelling indications that the State Commissioner's interpretation is wrong, or that it should not have been acceptable to federal authorities.

This appeal does not raise any substantial Federal question. The interpretation of Federal and State Law and Regulations with respect to the exemption of Federal and non-Federal educational grants or loans is one for cooperative Federal-State resolution and it has been resolved administratively (cf. *N.Y.S. Dept. of Social Services* v. *Dublino*, *supra*, p. 423).

CONCLUSION

The appeal should be dismissed.

Dated: November 10, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
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State of New York
Attorney for Appellees
The Capitol
Albany, New York 12224
Telephone: (518) 474-2956

ALAN W. RUBENSTEIN
Principal Attorney, State of New York

CLIFFORD A. ROYAEL
Principal Attorney, State of New York

of Counsel

*The letters from the Acting Assistant Regional Commissioner for OFA to which the Court of Appeals referred in footnote 1 of its opinion (A-8), are annexed hereto (AB-6-10).

APPENDIX

EXHIBIT A — LETTER FROM BARBARA ZARON ATTACHED TO PETITION

March 17, 1976

Mr. Edward R. Shannon
Senior Welfare Examiner
Coordinator of Employment Programs
Albany County Department of
Social Services
40 Howard Street
Albany, NY 12207

Dear Ed:

This is in response to your March 15 letter regarding Albany Business College's policy of first applying school costs towards TAP or HECP awards before applying costs against other types of student aid.

In the case of a student receiving financial aid for education from bot!. federal and other sources of assistance, it is the policy of this Department to charge the educational costs first against assistance received under a program or programs administered by the U.S. Commissioner of Education. Any remaining costs not covered by this type of assistance should then be charged against other types of educational assistance received by the student.

Although the regulations may not be sufficiently specific on this point, the policy interpretation was cleared with our counsel's office and therefore should result in a hearing decision which upholds the agency.

Sincerely,
/s/ BARBARA ZARON
Barbara Zaron, Director
Office of Employment Programs

EXHIBIT (9) SUBMITTED AT FAIR HEARING

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
1450 Western Avenue
Albany, New York 12203

ADMINISTRATIVE LETTER Transmittal No.: 75 ADM-89
Date: August 22, 1975

TO: All Commissioners of Social Services

SUBJECT: Treatment of Educational Loans, Grants, Scholarships or Other Income.

SUGGESTED: DISTRIBUTION: All Public Assistance Staff.

The purpose of this release is to clarify Department policy on utilization of income/resources intended for educational purposes. Department Regulation 352.16 has been amended to specifically provide for treatment of educational scholarship, grants and loans. [See Bulletin 134, H/B Transmittal 75 WB-21.]

Policy

A grant or loan to an undergraduate student for educational purposes made or insured by the U.S. Commissioner of Education shall *not* be considered as income or resources in determining need and amount of assistance.

Federally administered programs which are totally exempt include:

1. Basic Educational Opportunity Grants
2. College Work – Study Programs
3. Guaranteed Student Loans
4. National Defense Student Loans
5. Supplementary Educational Opportunity Grants

Exhibit (9) Submitted at Fair Hearing

Applicants/recipients shall advise the agency of receipt of such a grant or loan.

Educational loans, grants, scholarships, or other income from sources *other than* those made or insured by the U.S. Commissioner of Education/HEW – Office of Education (including state grants/loans such as the Tuition Assistance Program Awards, Educational Opportunity Program, SEEX, SAVE, College Discovery Program, Higher Educational Opportunity Program, Regents College Scholarships and N.Y. Higher Education Asst. Corp. Loans) shall be treated as follows:

1. The source of the loan, grant or scholarship shall be verified.
2. The amount of the loan, grant, or scholarship and the calendar months covered shall be verified.
3. The essential school expenses shall be documented. Such expenses include: tuition, books, fees, equipment, special clothing needs, transportation to and from school, and child care services necessary for school attendance.

Applicants/recipients must advise the local social services district of receipt of such educational loan, grant, scholarship, or other income and provide such documents necessary to verify source, amount and period covered as well as expenses necessary for such school attendance. After deducting the necessary school expenses, the balance of the loan, grant, scholarship, or other income shall be treated as a resource.

FILING REFERENCE
Prev. Comm.
74 ADM-94
Dept. Reg.
352.16
352.7(e)
Bulletin Ref.
B. 134

Exhibit (9) Submitted at Fair Hearing

FOR EXAMPLE:

Regents Scholarship	$250
Necessary school expenses	325
Resource	$000

FOR EXAMPLE:

TAP	$800/semester
Necessary school expenses	750/semester
Resource	$ 50

If you have any questions, please contact the Division of Income Maintenance.

Deputy Commissioner

EXHIBIT C — DECISION AFTER FAIR HEARING ATTACHED TO PETITION

In the Matter of the Appeal of
CASANDRA LUMPKIN
from a determination by the Albany County Department of Social Services (hereinafter called the agency)

Decision After Fair Hearing

A fair hearing was held at Albany, New York, on May 24, 1976, before Merle N. Fogg, Hearing Officer, at which the appellant, the appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of a grant of aid to dependent children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant is currently in receipt of a grant of aid to dependent children on behalf of herself and her minor brother.

(2) On April 16, 1976 the agency determined to reduce the appellant's grant by budgeting educational grants received by her for the 1976 Spring Semester.

(3) The appellant is the recipient of educational grants for the 1976 Spring Semester. She received a BEOG grant of $700.00, and a TAP award of $750.00.

The agency applied $700.00 of her educational expenses of $925.00 against the BEOG award, and applied the balance against the TAP grant. The remainder of the awards which it determined to be $475.00, it determined to budget over the period of the five month semester.

Section 352.16(a) of the Regulations of the State Department of Social Services provides that all available income shall be applied to meet the needs of a recipient unless otherwise exempted.

Exhibit C — Decision After Fair Hearing
Attached to Petition

Subdivision (c) of the cited regulation provides that no part of a scholarship, grant or other such income that is necessary to cover the cost of essential school expences and is actually so used, shall be considered as income in determining need and amount of assistance. This section also provides that no grant or loan to an undergraduate for educational purposes made or insured under any program administered by the United State Commissioner of Education shall be considered as income or resources in determining need and amount of assistance.

In this case, inasmuch as the BEOG grant cannot be considered as income, but is required to utilized for educational expenses, the agency properly offset $700.00 of those expenses against the BEOG award, and properly applied the balance of the expenses against the nonexempt awards. This leaves $925.00 as income to be applied against the appellant's grants for the school year. The agency improperly determined the available means to be $475.00.

In view of the foregoing the agency determination to budget available income from educational grants was correct, but the agency incorrectly determined the amount of the available income.

It is further noted that the agency determined to budget this income from May 1, 1976 through August 31, 1976. Inasmuch as the semester ended May 31, 1976, the agency's determination to apply such income in subsequent months was incorrect.

The agency is directed to budget the available income for the period April 26, 1976 through May 31, 1976.

DECISION: The determination of the agency to budget non-exempt available income from educational needs is affirmed. The determinations of the amount of such income to be budgeted and

Exhibit C — Decision After Fair Hearing
Attached to Petition

the period during which it would be budgeted cannot be and are not affirmed. The agency is directed to take appropriate action in accordance with this decision pursuant to Section 358.22 of the Regulations of the State Department of Social Services.

Dated: Albany, New York

/s/ PHILIP L. TOIA
Philip L. Toia
Commissioner

By: /s/ PETER MULLANY
Peter Mullany
Assistant Counsel

August 6, 1976

LETTER OF MARLENE Y. VIDIBOR
DATED MARCH 16, 1978

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGION 11
FEDERAL BUILDING
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

SOCIAL SECURITY
ADMINISTRATION

March 16, 1978

Mr. Jack Hickey,
Director
Income Support Group
Division of Income Maintenance
40 North Pearl Street
Albany, New York 12243

Dear Jack:

Attached is correspondence we recently sent out on educational grants. We trust this information will be of use to you.

Sincerely,

s/ MARLENE

Marlene Y. Vidibor
Program Specialist
for Office of Family Assistance

Attachments

LETTER OF FLORENCE AITCHISON
DATED MARCH 10, 1978

March 10, 1978

Mr. Barry Strom
Cornell Legal Aid
Myron Taylor Hall
Ithaca, New York 14853

Dear Mr. Strom:

Thank you for your letter of February 7, 1978 regarding the treatment of educational grants and loans under the Title IV program.

From a programmatic and legal review the New York State policy of applying Federal and State educational grant monies against educational expenses for the purpose of determining what remaining State grant monies can be applied against the AFDC grant, is acceptable. Federal policy does not permit the State to count Federal educational grants, or any part of such State grants being used for educational purposes, as income for living expenses to determine amount of need and assistance. However, New York State policy is, to determine, when taking all educational expenses into account, what part of the non-Federal grant may be available for living expenses. (Permitted per 45 CFR 233.20(a) (3) (iv) (o)). Their policy does not count Federal grants as income to determine need and assistance. It is permissible for them to regard the remainder of the non-Federal grant as income provided that they have correctly enumerated educational expenses. Any client in disagreement with the determination of the grant may of course request a fair hearing.

Letter of Florence Aitchison dated March 10, 1978

Attached is the only piece of correspondence we have had with the State which was sent at a time during which we believed local districts were misapplying State policy. All remaining communication with the State has been verbal.

As regards your reference to the New York Higher Educational Services Corporation loans. If these meet the criteria of 233.20(a)(4)(iii)(d) then they are Federal grants and need to be treated as such. Once again however, this provision does not preclude the New York State policy of applying educational expenses against these monies as educational expenses are not used to determine need and assistance.

If you have any further questions about this matter please do not hesitate to call Marlene Vidibor of my staff on 212-264-2892.

Sincerely,
Florence Aitchison
Acting Assistant Regional
Commissioner for OFA

Letter of Marlene Vidibor dated March 10, 1978

LETTER OF MARLENE VIDIBOR
DATED MARCH 10, 1978

MARCH 10, 1978

Mr. Jose Luis Torres
Staff Attorney
Bedford – Stuyvesant Community
Legal Services Corp.
1368-90 Fulton Street
Brooklyn, New York 11216

Dear Mr. Torres:

This is in reply to your letter of December 14, 1977 about New York State policy regarding treatment of educational grants. I regret the delay. However this was a matter requiring legal review. The July 6 letter to Seymour Katz resulted from our misunderstanding of local application of State policy. From a legal and programmatic point of view New York State policy does not violate Federal regulation. The State is not using the grants, save for that portion of non-Federal grants not needed for educational expenses, in determining need and assistance. Educational expenses are not an item of need and are not used to determine amount of assistance.

The only correspondence regarding this matter was the July 6 letter. All other communication has been verbal. If you have any further questions regarding this matter please do not hesitate to contact me.

Sincerely,

Marlene Vidibor
Program Specialist
for New York

MVidibor/sl/3/2/78

LETTER OF FLORENCE AITCHISON
DATED MARCH 10, 1978

March 10, 1978

Mr. Charles P. Spine
113 Benham Street
Penn Yan, New York 14527

Dear Mr. Spine:

Your letters to President Carter and Vice President Mondale and the responses you have already received were forwarded to our office for further consideration.

From a legal and programmatic review, the New York State policy of applying Federal and State educational grant monies (BEOG) against educational expenses, for the purpose of determining what remaining State educational grant monies (TAP) can be applied against an AFDC grant, is acceptable. Federal policy does not permit the State to count Federal educational grants, or any part of such State grants being used for educational expenses, as income for living expenses. However, New York State policy is to determine, when taking all educational expenses into account, what part of the TAP may be available for living expenses. It is permissable for them to regard this remainder as income provided that they have correctly enumerated your educational expenses.

If you do not agree with their determination you may of course request a fair hearing. I hope this information will be useful to you in understanding the Federal and State policies.

Sincerely,

Florence Aitchison
Acting Assistant Regional
Commissioner for OFA

MVidibor/sl/3/2/78